ORAL ARGUMENT NOT YET SCHEDULED

Case No. 15-1219 (and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UTILITY SOLID WASTE ACTIVITIES GROUP, *et al.*,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents

Petitions for Review of 80 Fed. Reg. 21,302 (April 17, 2015)

JOINT REPLY BRIEF OF INDUSTRY PETITIONERS

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July 14, 2016

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GLOSSARY

"CCR" means coal combustion residuals.

"CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*

"EPA" means United States Environmental Protection Agency.

"NODA" means 78 Fed. Reg. 46,940 (Aug. 2, 2013).

"Proposal" means 75 Fed. Reg. 35,128 (June 21, 2010).

"RCRA" means the Resource Conservations and Recovery Act, 42 U.S.C. § 6901 *et seq.*

"Rule" means 80 Fed. Reg. 21,302 (Apr. 17, 2015), codified at 40 C.F.R. Part 257.

STATUTES AND REGULATIONS

Except for the statute contained in the addendum to this brief, all applicable statutes and regulations are contained in the Briefs of Industry Petitioners, Respondents, or Environmental Intervenor-Respondents.

SUMMARY OF ARGUMENT

EPA has failed to demonstrate that it has the authority to regulate inactive impoundments under Subtitle D of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6941-6949a. First, EPA's suggestion that it can regulate inactive impoundments under the guise of "storage" because Industry Petitioners did not rebut this alleged authority is erroneous and misleading and contradicts EPA's own concession that the Rule in fact does *not* regulate storage of coal combustion residuals ("CCR"). EPA's suggestion that the Petition be denied for failure to challenge its alternative "storage" rationale—a rationale on which EPA concedes it did not rely in promulgating the Rule—is meritless.

Second, in attempting to rebut Industry Petitioners' showing that Subtitle D does not extend to past disposal practices, EPA argues for ambiguity where there is none and offers a strained reading of the statute that, if accepted, would contradict the plain language of Subtitle D and the structure of RCRA as a whole. EPA also concedes Congress distinguished the term "disposal" from the passive migration of contaminants from inactive units by using the term "release" in the Comprehensive

Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675. It, however, offers no credible reason why the same term should have a different meaning under RCRA. Even accepting EPA's assertion that passive migration is "disposal," the Rule would be overly broad because it regulates inactive impoundments even where passive migration, and thus disposal, is not occurring.

EPA also fails to defend the Rule's improper regulation of CCR destined for beneficial use. EPA's reliance on its ability to regulate CCR destined for disposal is inapposite. The Petition challenges the Rule's regulation of CCR which is *not* destined for disposal, but rather is held prior to beneficial use both on-site and off-site. EPA concedes that it never proposed to regulate CCR destined for beneficial use, yet the Rule does exactly that. Further, EPA has not provided any rational reason why *all* CCR held on-site prior to beneficial use should be treated differently than the exact same CCR that has been transferred off-site. EPA also concedes that the 12,400-ton criterion applied to CCR prior to beneficial use is based on a significant mathematical error. This concession is a *de facto* admission that the criterion is arbitrary and capricious.

EPA similarly fails to defend the Rule's dam safety requirements and seismic stability location restrictions. EPA concedes that the Proposal contained no inkling of the Rule's final dam safety technical criteria or compliance deadlines,

and it cannot rely on its own dam assessments—which were conducted after the proposed rulemaking and under a separate statutory scheme—to fix this procedural error. Further, EPA offers no rational justification for the Rule's imposition of compliance deadlines for both the dam safety requirements and the location restrictions that are impossible for many facilities to meet.

Finally, EPA provides only *post hoc* arguments to rebut our showing that the prohibition on considering costs and inconvenience when determining alternative disposal capacity is arbitrary and capricious. The Rule provides regulated parties no concrete standard for determining what constitutes alternative disposal capacity. EPA also failed to demonstrate adequate notice of the aquifer separation location restriction or to provide an adequate reason as to why the elimination of risk-based compliance alternatives in the Rule was not arbitrary and capricious.

ARGUMENT

I. The Rule Unlawfully Regulates Inactive Impoundments.

A. The Rule does not regulate CCR "storage."

EPA alleges that one of the bases under which it may regulate inactive impoundments is that the presence of CCR constitutes "storage," and that by failing to challenge EPA's authority to regulate CCR storage, Industry Petitioners are in procedural default. Resp. Br. 19-20. This is a red herring. The Rule does not regulate—and EPA did not propose to regulate—CCR storage. EPA cannot

justify regulation of inactive impoundments with an action that it simply did not take.[1]

The validity of an agency action must be judged on the grounds "upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). EPA's purported "storage" rationale—which appears only in a throw-away paragraph in the Rule's preamble—directly conflicts with EPA's unambiguous statements throughout the record that the Rule regulates only the "disposal" of CCR, not "storage." *See, e.g.*, 80 Fed. Reg. 21,302, 21,302 (Apr. 17, 2015) JA__ (EPA "is publishing a final rule to regulate the disposal of [CCR]"); *Id.* at 21,312, JA__ ("EPA did not propose to establish regulatory requirements that would restrict the … storage … of CCR prior to disposal."); Resp. Br. 11 ("only disposal activities must comply with the Rule's technical requirements."); *see also* Resp. Br. 12, 15-16.

EPA concedes it lacks authority under Subtitle D to regulate CCR storage, acknowledging that, "[i]n further contrast to subtitle C, RCRA subtitle D requirements would regulate *only the disposal* of solid waste, and EPA *does not*

[1] In any event, Industry Petitioners did challenge EPA's authority to regulate CCR storage, arguing "[t]he Rule's regulation of CCR storage … is directly at odds with multiple statements in the Proposal and preamble to the Rule that 'EPA did *not* propose to establish regulatory requirements that would restrict the generation, transportation, storage or treatment of CCR… .'" Ind. Pet. Br. 24. Tellingly, rather than responding that it did propose to regulate storage, EPA stated that placement on the land is *not storage* but disposal. Resp. Br. 49.

have the authority to establish requirements governing the transportation, *storage*, or treatment of such wastes prior to disposal." 75 Fed. Reg. 35,128, 35,160 (June 21, 2010), JA__ (emphasis added). Accordingly, the Rule's definition of "disposal"—the only CCR activity EPA concedes it can regulate—*excludes* storage. *See* 40 C.F.R. § 257.53 ("For purposes of this subpart, disposal does not include the storage … of CCR"). Given that the Rule does not actually regulate CCR storage, whether EPA could do so under 42 U.S.C. § 6907 is not before the Court. *See Chenery Corp.*, 318 U.S. at 94 (Agency "action must be measured by what the [agency] did, not by what it might have done.").

Thus, Industry Petitioners are not raising a new challenge for the first time in this brief. We have properly challenged the only ground—disposal of CCR—EPA used in its attempt to regulate inactive impoundments. EPA's suggestion that the Petition be denied for failure to challenge its alternative "storage" rationale—a rationale on which EPA did not actually rely—is specious.

B. EPA does not have authority to regulate inactive impoundments.

In trying to justify its regulation of inactive impoundments, EPA presents a tangled argument that muddies the issue before the Court and ignores critical statutory provisions. But the question posed is simple—does Subtitle D grant EPA authority to regulate inactive units that, by definition, ceased receiving CCR prior to the Rule's effective date? This inquiry encompasses two related but distinct

issues: (1) whether Subtitle D allows for regulation of past disposal practices; and, if not, (2) whether passive migration of contaminants from inactive units constitutes "disposal." RCRA's plain language, structure, legislative history, and applicable case law demonstrate that the answer to both questions is "no."

i. Subtitle D does not reach past disposal practices.

The plain language of the definition of "open dump" is written in the present tense. EPA offers no credible rebuttal to this fact. Instead, EPA argues that the "three magic words"—"is disposed of"—relied upon by Industry Petitioners are taken out of context and should not be given their literal meaning. However, we did not pluck "three magic words" out of Subtitle D. This critical phrase defines the temporal boundaries of what constitutes an "open dump" and is therefore the operative language for determining the scope of EPA's authority under Subtitle D.

"Congress' use of a verb tense is significant in construing statutes," *United States v. Wilson*, 503 U.S. 329, 333 (1992), and courts look to Congress' choice of verb tense to ascertain a statute's temporal reach. *See Carr v. United States*, 560 U.S. 438, 448 (2010). The Dictionary Act, 1 U.S.C. § 1, "also ascribes significance to verb tense" and, by implication, "instructs that the present tense generally does not include the past." *Id.*

Congress used the simple present tense to define "open dump"—units where "solid waste *is disposed of*… ." 42 U.S.C. § 6903(14) (emphasis added). For a

verb to apply to past conduct—*e.g.*, the disposal of CCR in an impoundment prior to the Rule's promulgation—the verb must be in the simple past ("was disposed of"), present perfect ("has been disposed of"), or past perfect ("had been disposed of"). The Chicago Manual of Style 236-37 (Univ. of Chicago Press ed., 16th ed. 2010). Congress could have defined "open dump" to include any of these verb forms—*e.g.*, "a unit where solid waste is or was disposed of"—but it did not choose this readily available option.

EPA's reliance on the definition of "disposal" actually supports this reading. EPA notes that "disposal" is the operative term for defining "sanitary landfill"—the converse of an "open dump." Resp. Br. 25. But the definition of "disposal" also is written in the present tense to mean "the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water… ." 42 U.S.C. § 6903(3). Thus, "open dump" and "sanitary landfill" are *both* defined to encompass present disposal activities.

The "holistic statutory approach" of analyzing RCRA, suggested by EPA (Resp. Br. 23), further confirms this position. Congress limited RCRA's reach over "past disposal" to select statutory provisions. *See* Ind. Pet. Br. 14-16. Under Sections 7002 and 7003, for example, EPA and citizens have the authority to address "*past or present* disposal of any solid waste" which "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C.

§§ 6972-73 (emphasis added). And, under Subtitle C, EPA may regulate "releases" from any solid waste management unit, "*regardless of the time at which waste was placed in such unit*." 42 U.S.C. § 6924(u) (emphasis added).

Congress put this statutory structure into place purposefully. Recognizing that risks from abandoned and inactive disposal sites was an "important regulatory gap[]" left by RCRA as originally enacted in 1976,[2] Congress subsequently filled the "gap" by (1) enacting CERCLA (*see* Ind. Pet. Br. 16-17), (2) adding the phrase "*past* or present disposal" to RCRA's imminent and substantial endangerment provision (*see* Ind. Pet. Br. 14), and (3) adding RCRA Section 3004(u), 42 U.S.C. § 6924(u), to address "releases" from inactive units so as to minimize the burdens on CERCLA in addressing the risks from inactive units (*see* Ind. Pet. Br. 15)[3]. Other than these targeted statutory changes, *no* other provisions of RCRA—including Subtitle D—were amended to address past disposals.

[2] Report on Hazardous Waste Disposal, Subcomm. On Oversight & Investigations, Comm. On Interstate & Foreign Commerce, 96th Cong., 1st Sess., H.R. Comm. Print IFC-31, at 7 (Sept. 1979), *reprinted in* 1 Legislative History of the Comprehensive Response Compensation and Liability Act of 1980: P.L. 96-510: 94 Stat. 2767: Dec. 11, 1980.

[3] *See also United Technologies Corp. v. EPA*, 821 F.2d 714, 722 (D.C. Cir. 1987) (discussing Congressional intent behind Section 3004(u)).

ii. Passive migration is not "disposal."

EPA does not rebut our showing that its interpretation of "disposal" as encompassing the passive migration of contaminants from inactive units reads the terms "past disposal" and "release" out of the statute. *See* Ind. Pet. Br. 18. Thus, EPA fails to answer the fundamental question: if the term "disposal" encompasses the passive migration of contaminants from inactive units, why did Congress subsequently have to use the terms "past disposal" and "release" to address such contamination?

EPA's response that "past or present disposal" was added to Section 7003 because Congress always intended this provision to apply to past disposal (Resp. Br. 34) ignores that the section, as originally enacted—"upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment…"—was interpreted to apply only to present actions. *See, e.g.*, *Unites States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 833-34 (W.D. Mo. 1984) (overturned following Congressional amendments to Section 7003). Congress then added "past or present" into Section 7003 precisely to address the risks from the passive migration of contaminants from inactive units. *See* Ind. Pet. Br. 14. EPA's position that the term "disposal" in Section 7003

already encompassed such contamination would render Congress' action superfluous.

Similarly, EPA disregards Congress' subsequent inclusion of the term "release" in Section 3004(u) to describe the gradual spread of contaminants from inactive units under the ruse that this is a Subtitle C provision. Resp. Br. 34. But the definition of "disposal" is the same under Subtitles C and D. Thus, the question remains: why did Congress use the distinct statutory term "release" if, as EPA contends, the term "disposal" already encompassed such activities?

EPA concedes that the term "release" in CERCLA describes passive migration, but then ignores that Congress used the same term in RCRA Section 3004(u) to address the same activity. Resp. Br. 29. Because CERCLA was enacted four years before Section 3004(u), Congress was well aware of the significant difference between the terms "disposal" and "release." It intentionally included the broader term "release" in Section 3004(u). *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

EPA and Environmental Intervenors also fail to distinguish the holdings of five other Circuits (Ind. Pet. Br. 21-22) that the term "release"—as opposed to the narrower term "disposal" as defined in RCRA—covers the gradual spread of

contamination from past disposal. EPA argues that a term like "navigable waters" shared among environmental statutes may mean different things in different contexts. Resp. Br. 28. But "disposal" is far more than a "shared term." Congress specifically directed that the term "disposal" under CERCLA "*shall have the meaning*" of "disposal" under RCRA. 42 U.S.C. § 9601(29) (emphasis added). Thus, the term must have the same meaning in both contexts.[4] Not surprisingly, therefore, courts routinely interpret "disposal" to have the exact same meaning under both CERCLA and RCRA. *See, e.g.*, *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 853 (7th Cir. 2008) ("Because the definition of 'disposal' is the same, our reasoning that established that there was no disposal under CERCLA applies to a RCRA analysis as well.").

Nor does EPA's reliance on *In re Consolidated Land Disposal Regulation Litigation*, 938 F.2d 1386 (D.C. Cir. 1991), support its position. That case considered whether EPA could apply post-closure care requirements on an *active* disposal unit—*i.e.*, a unit that received regulated waste after the effective date of the applicable regulation—after the unit later ceased receiving waste. This is not the legal issue presented here—namely, whether the gradual spread of contaminants from *inactive* units that ceased receipt of waste *prior* to the

[4] For the same reason, Industry Petitioners are not improperly "conflating" "disposal" under CERCLA with "disposal" under RCRA. *See* Env. Int. Br. 9.

promulgation of regulations constitutes "disposal" under RCRA. The Court's statement that *leaking* from an *active* unit can amount to "disposal" is not at odds with Congress' use of the broader term "release"—and not the narrower term "disposal"—to describe the type of passive migration from an *inactive* unit at issue here.[5]

Even accepting that passive migration is "disposal," the Rule remains overbroad, as it improperly encompasses inactive impoundments where passive migration is *not* occurring. Contrary to EPA's argument, this does not mean that EPA cannot regulate *active* units, where regulation is *not* based on whether the impoundment is the source of passive migration. Active impoundments, by definition, receive CCR after the Rule's effective date and are thus clearly engaged in "disposal"—the predicate to EPA's authority under Subtitle D. Unlike active units, only a subset of inactive impoundments are, under EPA's own theory, engaged in "disposal." *See* Resp. Br. 88 (less than half of impoundments will leak, *i.e.*, experience passive migration). Therefore, EPA's regulation of *all* inactive impoundments exceeds its Subtitle D authority because such regulation, as EPA

[5] Similarly, the "ongoing violation" cases EPA references are inapposite. Resp. Br. 27. These cases found that the failure to clean up a disposal can be an ongoing violation, even where the disposal itself occurred *in the past*. *See, e.g.*, *Gache v. Town of Harrison*, 813 F. Supp. 1037, 1041-42 (S.D.N.Y. 1993). Thus, these holdings were not dependent on (and did not consider) whether passive migration constitutes disposal.

itself concedes, encompasses some inactive impoundments not leaking—*i.e.*, not engaged in CCR "disposal."

II. Regulation of CCR Destined for Beneficial Use is Unlawful

A. Regulation of off-site CCR destined for beneficial use was not noticed.

EPA claims it provided notice that CCR in excess of 12,400 tons held off-site prior to beneficial use would be regulated because: (1) CCR placed on land is "disposal" not "storage;" (2) the proposed "CCR landfill" definition included "piles;" and (3) EPA solicited comment on the term "large-scale fill" (Resp. Br. 49-51). These arguments fail.

First, EPA does not claim that it is regulating off-site CCR destined for beneficial use as "storage," but rather claims such a practice constitutes "disposal" if the 12,400 ton criterion is not met. But EPA concedes it does not deem CCR transferred off-site prior to beneficial use to be "disposal." Resp. Br. 44-45. Second, while the proposed "CCR landfill" definition included "piles," the proposed "beneficial use" definition did not. Ind. Pet. Br. 25. As EPA confirms, off-site temporary storage "is not considered a CCR pile." Resp. Br. 46. Finally, EPA never hinted—nor would it be reasonable for commenters to have assumed—that temporary storage for use as a manufacturing ingredient could be deemed "fill" of any magnitude, much less "large-scale fill."

B. Regulation of on-site CCR destined for beneficial use was not noticed.

EPA also failed to provide notice that it would regulate CCR held on-site prior to beneficial use as a landfill. EPA's Proposal distinguished "between CCR[] that are destined for disposal and those that are beneficially used" (75 Fed. Reg. at 35,162, JA__) and stated that it would *only* regulate CCR "going to disposal" (*id.* at 35,148, JA__). EPA gave no indication that it would regulate as CCR landfills all on-site CCR *destined for beneficial use*.

EPA argues adequate notice was given because the proposed definition of "CCR landfills" included "piles." Resp. Br. 50. This is irrelevant. We have challenged whether EPA gave notice that it would regulate CCR destined for beneficial use, not whether it would regulate CCR destined for disposal. Further, EPA misconstrues isolated comments on the Proposal to assert that Petitioners had adequate notice. Resp. Br. 50. In fact, the cited comments refer to temporary staging of CCR prior to *disposal*, not temporarily holding CCR prior to *beneficial use*. *See* EPA-HQ-RCRA-2009-0640-10483 at 192, JA__; EPA-HQ-RCRA-2009-0640-06299 at 18, JA__. Neither the Proposal nor comments received provide any indication that EPA intended to treat on-site CCR destined for beneficial use as landfills.

C. Regulation of on-site CCR destined for beneficial use is arbitrary and capricious.

EPA arbitrarily regulates all on-site CCR destined for beneficial use as "disposal" and subject to regulation as landfills, while exempting less than 12,400 tons of CCR stored off-site before beneficial use. RCRA is intended to promote the beneficial use of materials as an alternative to disposal. *Am. Mining Congress v. EPA*, 824 F.2d 1177, 1185-86 (D.C. Cir. 1987). While EPA applied the "beneficial use" criteria to off-site CCR, it illogically used a one-size-fits-all approach to on-site CCR, without considering any actual "indicia" regarding whether particular CCR is in fact destined for beneficial use.

EPA attempts to rationalize this disparate regulation because, in some circumstances, on-site CCR destined for beneficial use may be "indistinguishable" from CCR destined for disposal. Resp. Br. 48. But the fact that some on-site CCR is not destined for timely beneficial use cannot justify a bright-line rule regulating all on-site CCR as landfills. *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 737 (D.C. Cir. 1990) (EPA must provide "a rational connection between the facts found and the choice made" (internal quotations omitted)).

EPA effectively concedes some on-site CCR is destined for timely beneficial use, stating that "if the pile is located onsite at the coal-combusting facility, with no obvious indicia that it is in the relatively immediate process of being beneficially used, it is subject to regulation as a CCR pile." Resp. Br. 48. EPA

therefore concedes that some on-site CCR does have "obvious indicia" of beneficial use and should not be regulated as a landfill. Contrary to EPA's concession, the Rule does not allow for this distinction.

It is arbitrary for EPA to treat all on-site CCR as "disposal" and assume in all cases it has no "indicia" of beneficial use. Indeed, an on-site inventory of CCR destined for beneficial use could be smaller in volume and held for less time than off-site CCR intended for beneficial use, with the former subject to regulation as a landfill and the latter excluded from such regulation.

III. The 12,400-Ton Threshold Must be Vacated as Wholly Irrational.

We challenged the 12,400-ton threshold as based on a substantial mathematical mistake. While EPA concedes this threshold was based on an "unfortunate" mistake (Resp. Br. 54-55), it nonetheless claims "wide discretion" in line-drawing, asserting that the relevant question is "not whether its numbers are precisely right." Resp. Br. 56. But EPA's mistake produced a threshold 600% smaller than intended,[6] an error manifestly outside any "precisely right" leeway.

EPA next claims the error is of no moment because it would have selected a similar threshold using another rationale. Resp. Br. 55. The final rulemaking refutes this argument. EPA selected the threshold "because the available evidence

[6] 74,800 tons, the smallest size landfill when the erroneous calculations are corrected, is more than 600% greater than 12,400 tons.

in the record" demonstrated that the risks from the volumes of CCR in the smallest-size landfill "are of such significance to warrant regulation." 80 Fed. Reg. at 21,352, JA__. "[B]ased on the current rulemaking record, EPA lack[ed] the information necessary to demonstrate that unencapsulated uses in smaller amounts are likely to present a risk." *Id.* The theories in EPA's Brief are *post hoc* rationalizations and cannot be accepted. *Chenery Corp.*, 318 U.S. at 95.

EPA asserts that its error should be forgiven because "industry" submitted the miscalculated data. Resp. Br. at 55. The data in question were submitted by a landfill owner not a party to this case. An "industry" group called the error to EPA's attention during the rulemaking and demonstrated the error to EPA well over a year ago. Ind. Pet. Br. 33. It defies belief that EPA can (1) concede the 12,400-ton number is a 600% error, and (2) take no corrective action after more than a year of notice.

Finally, EPA states there is no prejudice because "most" CCR uses "are not expected to reach the 12,400-ton threshold." Resp. Br. 56. Many CCR land applications, however, occur at levels above 12,400 but less than 74,800 tons. Projects of 60,000 tons and 20,000 tons were in fact identified in public comments. Comments of Headwaters Resources, Inc. on Proposal, EPA-HQ-RCRA-2012-0028-0115, at 2-3, JA__. Moreover, the Petitioners that engage in beneficial use

often beneficially use more than 12,400 but far less than 74,800 tons of CCR and are clearly prejudiced by EPA's conceded mistake.

IV. EPA Provided Inadequate Notice of the Dam Safety Factors.

EPA argues that the Rule's mandatory dam safety criteria were appropriately noticed because they could have been gleaned from various guidance documents referenced in the Proposal and in subsequent notices of data availability ("NODAs"). Resp. Br. 37-39. But the difference between the Proposal and the Rule was not simply in the details of certain technical criteria. The Proposal required the owner/operator of an existing impoundment to compile and post to a publicly-accessible website certain information regarding the history of the impoundment's construction and any record or knowledge of instability. 75 Fed. Reg. at 35,243-44 (proposed §§ 257.71(b), (d)), JA__. This information was to include either: (i) a certification that the design of the impoundment is in accordance with prudent engineering practices, or (ii) a report identifying additional work needed to make this certification and a schedule for completing that work. 75 Fed. Reg. at 35,244 (proposed § 257.71(d)(13)), JA__.

The Rule, by contrast, converted this proposal into a formal, ongoing safety assessment certification imposing specified mandatory technical criteria, thereby eliminating the application of professional engineering judgment in defining standards for each impoundment based on its particular circumstances. The Rule

also established a deadline—nowhere included in the Proposal—for meeting the criteria and a new condition compelling closure of an impoundment if the criteria or deadline are not met. 40 C.F.R. § 257.74(f).

EPA points to nothing in the record giving notice of this fundamental transformation. That EPA performed safety assessments for many existing impoundments under a separate statutory initiative (Resp. Br. 38) does not satisfy EPA's obligation to notice its intention to establish new dam safety requirements applying specific mandatory technical criteria. The NODA for EPA's dam assessment program merely requested comment generally on the extent to which any information from those assessments "should be factored into EPA's final rule." 78 Fed. Reg. 46,940, 46,944 (Aug. 2, 2013), JA__. EPA did not notify the public of how it actually intended to use this information in formulating the final rule, or provide any opportunity to comment on the Rule's new requirement to apply specific technical criteria with no room for engineering judgment.[7]

EPA also fails to show that it adequately noticed the requirement to meet the dam safety criteria within 18 months of the Rule's publication or close. EPA argues the Proposal required compliance within six months after the Rule's publication, and therefore the Rule actually provides more time for compliance

[7] The lack of adequate notice is particularly glaring with respect to the Rule's seismic stability safety factor. The Proposal contains no reference to any seismic stability requirement.

and/or closure than the Proposal. Resp. Br. 41-42. However, the Proposal did not specify a firm deadline for the engineer's safety certification, but in fact allowed for the development of a schedule by the owner/operator to make the certification if additional work was necessary. *See* 75 Fed. Reg. at 35,244 (proposed § 257.71(d)(13)), JA__.

The Proposal thus provided no opportunity for public comment on (1) whether 18 months is sufficient to complete any upgrades necessary to meet the new dam safety criteria; (2) the requirement that an impoundment close if the engineer's certification could not be made by a specified deadline; or (3) the directive that a non-compliant facility would have to cease accepting CCR within two years of publication. Indeed, the Proposal acknowledged that even four years is not enough time to arrange for alternate disposal at facilities that must convert from wet to dry ash handling. 75 Fed. Reg. at 35,178, JA__.

Thus, the Proposal clearly contemplated that existing impoundments that could not meet the promulgated requirements could continue operating for more than four years to allow time to arrange for alternate disposal without causing power plants to cease operating. Industry thus had no reason to expect, and no opportunity to comment on, the two-year operating deadline interjected by the Rule.

V. Aspects of the Dam Safety Requirements and Seismic Stability Location Restrictions Are Arbitrary and Capricious.

As EPA emphasized in promulgating the Rule: "the law cannot compel actions that are physically impossible, and it is incumbent on EPA to develop a regulation that does not in essence establish such a standard." 80 Fed. Reg. at 21,423, JA__. But this is precisely the effect of the Rule's respective two-year and four-year operating deadlines for existing impoundments that cannot meet the safety assessment factors or location restrictions, based on EPA's own finding that more than four years will be needed to arrange for alternate disposal for units that must close. This is a textbook arbitrary and capricious action.

EPA claims the compliance deadlines under the safety assessment requirement are based on the amount of time needed under normal circumstances for a facility to come into compliance. Resp. Br. 64. But this response fails to address the circumstance where it is simply not feasible to upgrade an existing impoundment to meet the new technical criteria. Although the Rule does not mandate conversion from wet- to dry-handling, in some cases that is the only practicable means to comply with the Rule.[8]

[8] EPA points to the possibility of installing a liner at an existing impoundment (Resp. Br. 65 n.13), but installing a liner would not be effective in meeting the seismic safety criterion.

EPA argues that nothing in the record shows that any significant number of impoundments would be unable to satisfy the dam safety requirements and thus be forced to close, but the burden is on EPA to show that compliance is feasible for all facilities subject to the rule. Furthermore, with respect to the seismic safety factor, EPA fails to address the fact that the record contains no rationale for imposing an unworkable two-year operating deadline to address a risk based on the remote contingency of the most significant earthquake likely to occur over a period of 2,500 years.

With respect to the Rule's seismic location restriction, EPA tries to defend its unexplained decision to reduce the operating deadline for non-compliant CCR units from five years to four years, by arguing that the Proposal, "upon closer examination," actually allowed such units to operate for only 18 months and that they had to complete closure within five years. Resp. Br. 70. This is not correct. The Proposal stated that non-complying facilities "must close by" a date five years after the effective date of the Rule. 75 Fed. Reg. at 35,243 (proposed § 257.65), JA__. The preamble indicates that this deadline referred to the date when the facility must cease accepting waste and *initiate* closure rather than actually *complete* closure.[9] 75 Fed. Reg. at 35,177-78, JA__ ("Given … the process

[9] Although this text appears in the discussion of the subtitle C proposal, EPA stated that the time frames for closure under the subtitle D proposal were intended to be "consistent with those EPA is proposing under its subtitle C co-proposal" and that

changes that the facilities will need to implement to covert to dry handling, EPA believes it [is] not practicable to require surface impoundments to cease receiving CCR waste … [within] four years and that additional time is appropriate."). Further, the Proposal would have allowed CCR units only 180 days to complete the closure process once closure was initiated. *See* 75 Fed. Reg. at 35,252-53 (proposed § 257.100), JA__. Thus, EPA's after-the-fact re-interpretation of the Proposal's timeline for closure—that units would have had 18 months to operate and 42 months to complete the closure process—does not wash. The Proposal contemplated providing up to five years to demonstrate compliance with the location restrictions or arrange for alternate means of disposal and only then ceasing receipt of CCR and commencing closure if the required demonstration was not made by that time.

Finally, EPA does not point to an adequate basis for applying the seismic location restrictions not just to new CCR landfills, but also to any expansion of an existing landfill. EPA argues that the different regulatory treatment of new and existing landfills is justified because new landfills "can easily be constructed to meet the Rule's engineering performance standards." Resp. Br. 72. But the same

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it was "aware of no reason that the time frames would need to differ under subtitled D." 75 Fed. Reg. at 35,202, JA__. Indeed, to EPA's point, the time required to secure alternate disposal (or to convert to dry handling) is not dependent on the regulatory scheme mandating closure.

cannot be said for the expansion of an existing landfill to an adjacent cell in accordance with a design and layout that has been previously approved and permitted. Thus, EPA's application of the location restrictions to an expansion of an existing landfill is contrary to its stated rationale for distinguishing between new and existing landfills.

VI. The Alternative Closure Provision as Written Has No Meaningful Standard and is Unlawful.

Industry Petitioners are not challenging EPA's ability to set meaningful limitations on the alternative closure provision. Rather, we contend that the absolute prohibition on considering cost and inconvenience renders the provision—which EPA acknowledged is critical to prevent "the significant risks associated with the disruption of power generation that could result from immediate closure" (Resp. Br. 57)—a nullity. If "cost or inconvenience" cannot be considered to *any degree* in assessing the availability of "alternative disposal capacity," the question remains: what can be considered? In response, EPA now offers the *post hoc* argument that the standard is now one of "force majeure" (Resp. Br. 59). This condition appears nowhere in the Rule. Moreover, even a "force majeure" event would have no bearing on finding alternative disposal capacity if cost or inconvenience cannot be considered. While EPA can establish limitations on when or to what extent cost and inconvenience can be considered, a complete bar on such considerations, and EPA's failure to articulate concrete

criteria for determining lawful qualification for alternative closure, is arbitrary and capricious. This provision must be remanded to establish affirmative criteria to which regulated entities can conform. *See Defs. Of Wildlife v. Salazar*, 842 F. Supp. 2d 181, 187-88 (D.D.C. 2012) (citing *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006)).

VII. The Elimination of Risk-Based Compliance Alternatives is Arbitrary and Capricious.

While EPA certainly can alter proposed provisions in a final rule, such changes must be grounded in reasonable decision making. EPA claims that "the reliability of company engineers" was "not a factor" in removing from the Rule the ability to select alternative health-based standards (proposed § 257.95(h)) and the remediation waiver (proposed § 257.97(e)-(f)). Resp. Br. 78 n.15. But this is exactly the reason EPA provided in making these changes. See 80 Fed. Reg. at 21,405, JA__ (alternative standards are "too susceptible to potential abuse"); *id.* at 21,407, JA__ ("there is no [] guarantee that an individual facility will act in the public interest"). This reasoning runs directly counter to EPA's explicit finding that qualified professional engineer certifications that would have supported these determinations are not subject to potential abuse and would be adequately protective. *Id.* at 21,336-37. The elimination of these options in the Rule is the very definition of arbitrary and capricious decision making.

VIII. The Aquifer Separation Restriction Was Not Noticed as Applied to Existing Impoundments.

EPA concedes the proposed aquifer restriction excluded existing impoundments. *See* 80 Fed. Reg. at 21,360, JA__ ("[T]he proposed rule should have included, 'all surface impoundments,' as opposed to only 'new surface impoundments.'"). Parties therefore justifiably concluded the proposed regulations were controlling, notwithstanding the preamble's contradictory language. *See Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 237 (D.D.C. 2014**)**. Despite select comments on this contradiction, adequate notice is due to *all* parties. Intentions aside, EPA's proposed aquifer restriction excluded existing impoundments. Therefore, the Rule's application to such units must be vacated.

CONCLUSION

For the foregoing reasons and those previously submitted to Court, Industry Petitioners request the relief specified in their Opening Brief.[10]

[10] Industry Petitioners no longer seek the relief associated with issues III.D, III.E, and IV.C.ii raised in their Opening Brief, as those issues have been addressed by the Court's June 14, 2016 Order Granting EPA's Motion to Remand.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's briefing order of November 17, 2015 because this brief contains 5,983 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14 pt. Times New Roman font.

DATED: July 14, 2016

/s/ Douglas H. Green
Douglas H. Green

CERTIFICATE OF SERVICE

Pursuant Fed. R. of App. P. 25 and D.C. Circuit Rule 25(c), I hereby certify that I have this 14th day of July 2016, served a copy of the foregoing Joint Reply Brief of Industry Petitioners, including the Addendum thereto, on all counsel of record electronically through the Court's CM/ECF system or by U.S. mail, postage prepaid.

/s/ Douglas H. Green
Douglas H. Green

Case No. 15-1219 (and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UTILITY SOLID WASTE ACTIVITIES GROUP, *et al.*,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents

Petitions for Review of 80 Fed. Reg. 21,302 (April 17, 2015)

ADDENDUM:

PERTINENT STATUTES AND REGULATIONS

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STATUTES:

THE CODE OF LAWS OF THE UNITED STATES OF AMERICA

TITLE 1—GENERAL PROVISIONS

This title was enacted by act July 30, 1947, ch. 388, §1, 61 Stat. 633

POSITIVE LAW; CITATION

This title has been made positive law by section 1 of act July 30, 1947, ch. 388, 61 Stat. 633, which provided in part that: ''Title 1 of the United States Code entitled 'General Provisions', is codified and enacted into positive law and may be cited as '1 U. S. C., §——.' ''

REPEALS

Section 2 of act July 30, 1947, provided that the sections or parts thereof of the Statutes at Large or the Revised Statutes covering provisions codified in this Act are repealed insofar as the provisions appeared in former Title 1, and provided that any rights or liabilities now existing under the repealed sections or parts thereof shall not be affected by the repeal.

WRITS OF ERROR

Section 23 of act June 25, 1948, ch. 646, 62 Stat. 990, provided that: ''All Acts of Congress referring to writs of error shall be construed as amended to the extent necessary to substitute appeal for writ of error.''

TABLE SHOWING DISPOSITION OF ALL SECTIONS OF FORMER TITLE 1

Title 1 Former Sections	*Revised Statutes Statutes at Large*	*Title 1 New Sections*
1	R.S., §1	1
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6	June 11, 1940, ch. 325, §1, 54 Stat. 305	6
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30	Jan. 12, 1895, ch. 23, §73, 28 Stat. 615 June 20, 1936, ch. 630, §9, 49 Stat. 1551. June 16, 1938, ch. 477, §1, 52 Stat. 760.	112
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52	May 29, 1928, ch. 910, §2, 45 Stat. 1007 Mar. 2, 1929, ch. 586, §2, 45 Stat. 1541.	202
53	May 29, 1928, ch. 910, §3, 45 Stat. 1007	203
54	May 29, 1928, ch. 910, §4, 45 Stat. 1007 Mar. 2, 1929, ch. 586, §3, 45 Stat. 1541.	204
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54b	Mar. 2, 1929, ch. 586, §5, 45 Stat. 1542 Mar. 4, 1933, ch. 282, §1, 47 Stat. 1603. June 13, 1934, ch. 483, §§1, 2, 48 Stat. 948.	206
54c	Mar. 2, 1929, ch. 586, §6, 45 Stat. 1542	207
54d	Mar. 2, 1929, ch. 586, §7, 45 Stat. 1542	208
55	May 29, 1928, ch. 910, §5, 45 Stat. 1007	209
56	May 29, 1928, ch. 910, §6, 45 Stat. 1007	210
57	May 29, 1928, ch. 910, §7, 45 Stat. 1008	211
58	May 29, 1928, ch. 910, §8, 45 Stat. 1008	212
59	May 29, 1928, ch. 910, §10, 45 Stat. 1008	213
60	Mar. 3, 1933, ch. 202, §2, 47 Stat. 1431	Rep.

CHAPTER 1—RULES OF CONSTRUCTION

AMENDMENTS

2002—Pub. L. 107–207, §2(b), Aug. 5, 2002, 116 Stat. 926, added item 8.

1996—Pub. L. 104–199, §3(b), Sept. 21, 1996, 110 Stat. 2420, added item 7.

§1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

[1] So in original. Does not conform to section catchline.

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words ''insane'' and ''insane person'' shall include every idiot, insane person, and person non compos mentis;

the words ''person'' and ''whoever'' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

''officer'' includes any person authorized by law to perform the duties of the office;

''signature'' or ''subscription'' includes a mark when the person making the same intended it as such;

''oath'' includes affirmation, and ''sworn'' includes affirmed;

''writing'' includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

(July 30, 1947, ch. 388, 61 Stat. 633; June 25, 1948, ch. 645, §6, 62 Stat. 859; Oct. 31, 1951, ch. 655, §1, 65 Stat. 710; Pub. L. 112–231, §2(a), Dec. 28, 2012, 126 Stat. 1619.)

AMENDMENTS

2012—Pub. L. 112–231, in fifth clause after opening clause, struck out ''and 'lunatic' '' before ''shall include every'' and ''lunatic,'' before ''insane person,''.

1951—Act Oct. 31, 1951, substituted, in fourth clause after opening clause, ''used'' for ''use''.

1948—Act June 25, 1948, included ''tense'', ''whoever'', ''signature'', ''subscription'', ''writing'' and a broader definition of ''person''.

SHORT TITLE OF 2012 AMENDMENT

Pub. L. 112–231, §1, Dec. 28, 2012, 126 Stat. 1619, provided that: ''This Act [amending this section and sections 92a, 215, and 215a of Title 12, Banks and Banking] may be cited as the '21st Century Language Act of 2012'.''

SHORT TITLE OF 2002 AMENDMENT

Pub. L. 107–207, §1, Aug. 5, 2002, 116 Stat. 926, provided that: ''This Act [enacting section 8 of this title] may be cited as the 'Born-Alive Infants Protection Act of 2002'.''

SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104–199, §1, Sept. 21, 1996, 110 Stat. 2419, provided that: ''This Act [enacting section 7 of this title and section 1738C of Title 28, Judiciary and Judicial Procedure] may be cited as the 'Defense of Marriage Act'.''

REFERENCES IN PUB. L. 113–235

Pub. L. 113–235, §3, Dec. 16, 2014, 128 Stat. 2132, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated and Further Continuing Appropriations Act, 2015, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 113–76

Pub. L. 113–76, §3, Jan. 17, 2014, 128 Stat. 7, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2014, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 113–67

Pub. L. 113–67, div. A, §1(c), Dec. 26, 2013, 127 Stat. 1166, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Bipartisan Budget Act of 2013, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 113–6

Pub. L. 113–6, §3, Mar. 26, 2013, 127 Stat. 199, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in division A, B, C, D, or E of this Act [Consolidated and Further Continuing Appropriations Act, 2013, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 112–74

Pub. L. 112–74, §3, Dec. 23, 2011, 125 Stat. 787, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2012, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 112–55

Pub. L. 112–55, §3, Nov. 18, 2011, 125 Stat. 552, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated and Further Continuing Appropriations Act, 2012, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 112–10

Pub. L. 112–10, div. A, title IX, §9015, Apr. 15, 2011, 125 Stat. 102, provided that: ''Any reference to 'this Act' in this division [Department of Defense Appropriations Act, 2011, see Tables for classification] shall apply solely to this division.''

REFERENCES IN PUB. L. 111–118

Pub. L. 111–118, §3, Dec. 19, 2009, 123 Stat. 3409, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Department of Defense Appropriations Act, 2010, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 111–117

Pub. L. 111–117, §3, Dec. 16, 2009, 123 Stat. 3035, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2010, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 111–8

Pub. L. 111–8, §3, Mar. 11, 2009, 123 Stat. 525, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Omnibus Appropriations Act, 2009, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 111–5

Pub. L. 111–5, §4, Feb. 17, 2009, 123 Stat. 116, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [American Recovery and Reinvestment Act of 2009, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 110–329

Pub. L. 110–329, §3, Sept. 30, 2008, 122 Stat. 3574, provided that: ''Except as expressly provided otherwise,

any reference to 'this Act' or 'this joint resolution' contained in any division of this Act [Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 110–161

Pub. L. 110–161, § 3, Dec. 26, 2007, 121 Stat. 1845, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2008, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 110–116

Pub. L. 110–116, § 2, Nov. 13, 2007, 121 Stat. 1295, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [see Tables for classification] shall be treated as referencing only to the provisions of that division.''

REFERENCES IN PUB. L. 109–289

Pub. L. 109–289, div. A, title VIII, § 8112, Sept. 29, 2006, 120 Stat. 1299, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in this division [Department of Defense Appropriations Act, 2007, see Tables for classification] shall be referring only to the provisions of this division.''

REFERENCES IN PUB. L. 109–148

Pub. L. 109–148, div. B, title V, § 5002, Dec. 30, 2005, 119 Stat. 2813, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in either division A [Department of Defense Appropriations Act, 2006, see Tables for classification] or division B [Emergency Supplemental Appropriations Act to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza, 2006, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 109–115

Pub. L. 109–115, div. A, title VIII, § 847, Nov. 30, 2005, 119 Stat. 2507, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in this division [Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act, 2006, see Tables for classification] shall be treated as referring only to the provisions of this division.''

REFERENCES IN PUB. L. 108–447

Pub. L. 108–447, § 3, Dec. 8, 2004, 118 Stat. 2810, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2005, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 108–199

Pub. L. 108–199, § 3, Jan. 23, 2004, 118 Stat. 4, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act [Consolidated Appropriations Act, 2004, see Tables for classification] shall be treated as referring only to the provisions of that division.''

REFERENCES IN PUB. L. 108–7

Pub. L. 108–7, § 3, Feb. 20, 2003, 117 Stat. 12, provided that: ''Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this joint resolution [Consolidated Appropriations Resolution, 2003, see Tables for classification] shall be treated as referring only to the provisions of that division.''

CONTINENTAL UNITED STATES

Pub. L. 86–70, § 48, June 25, 1959, 73 Stat. 154, provided that: ''Whenever the phrase 'continental United States' is used in any law of the United States enacted after the date of enactment of this Act [June 25, 1959], it shall mean the 49 States on the North American Continent and the District of Columbia, unless otherwise expressly provided.''

§ 2. "County" as including "parish", and so forth

The word ''county'' includes a parish, or any other equivalent subdivision of a State or Territory of the United States.

(July 30, 1947, ch. 388, 61 Stat. 633.)

§ 3. "Vessel" as including all means of water transportation

The word ''vessel'' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

(July 30, 1947, ch. 388, 61 Stat. 633.)

§ 4. "Vehicle" as including all means of land transportation

The word ''vehicle'' includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land.

(July 30, 1947, ch. 388, 61 Stat. 633.)

§ 5. "Company" or "association" as including successors and assigns

The word ''company'' or ''association'', when used in reference to a corporation, shall be deemed to embrace the words ''successors and assigns of such company or association'', in like manner as if these last-named words, or words of similar import, were expressed.

(July 30, 1947, ch. 388, 61 Stat. 633.)

§ 6. Limitation of term "products of American fisheries"

Wherever, in the statutes of the United States or in the rulings, regulations, or interpretations of various administrative bureaus and agencies of the United States there appears or may appear the term ''products of American fisheries'' said term shall not include fresh or frozen fish fillets, fresh or frozen fish steaks, or fresh or frozen slices of fish substantially free of bone (including any of the foregoing divided into sections), produced in a foreign country or its territorial waters, in whole or in part with the use of the labor of persons who are not residents of the United States.

(July 30, 1947, ch. 388, 61 Stat. 634.)

§ 7. Definition of "marriage" and "spouse"

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ''marriage'' means only a legal union between one man and one woman as husband and wife, and the word ''spouse'' refers only to a person of the opposite sex who is a husband or a wife.

(Added Pub. L. 104–199, § 3(a), Sept. 21, 1996, 110 Stat. 2419.)

CONSTITUTIONALITY

For information regarding constitutionality of this section, as added by section 3(a) of Pub. L. 104–199, see